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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARK WOOD,
Plaintiff,
v. 2:00-CV-546-FTM-29D
CHARLIE GREEN, CLERK
OF THE CIRCUIT COURT
FOR LEE COUNTY, FLORIDA,
Defendant.

APPEARANCES:
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MEMORANDUM-DECISION AND ORDER

McCURN, Senior Judge:[1]

[1]Senior United States District Court Judge for the Northern District of New York, sitting by designation.

Plaintiff, Mark Wood commenced this action on December 8, 2000, against his former employer Charlie Green, Clerk of the Circuit Court for Lee County, Florida, alleging violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12101 et seq., ("ADA") and the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq., ("FMLA"), among other things. on February 14, 2002, following an eight-day jury trial, a verdict was returned in favor of plaintiff on the ADA discrimination claim and in favor of the defendant on the FMLA claim. On the ADA claim, the jury awarded Wood back pay damages in the amount of $109,033 but declined to award him any amount for physical or emotional damages. The Court subsequently granted Wood's motion for reinstatement but stayed such order pending appeal. On February 27, 2002, judgment was entered accordingly.

Defendant now moves pursuant to Fed. R. Civ. P. 50(b) for judgment as a matter of law. For the following reasons, the motion is denied.

BACKGROUND

Wood began his employment with the Clerk's Office in 1974. In 1978, Wood began suffering from cluster headaches. By 1985, Wood's cluster headaches increased in severity, causing him to miss lengthening periods of work and preventing him from accomplishing a substantial portion of his duties as a supervisor in the civil section of the circuit and County courts. As a result, the Clerk's Office eventually created a new position for Wood -- Court's Coordinator. Wood's new position required him, among other things, to review new legislation and Florida Supreme Court Rules that affected the courts and to establish procedures accordingly.

Although Wood's cluster headaches subsided for a period of time, they returned worse than ever. In 1995, Wood missed a total of seven weeks of work. Wood's condition

continued to cause him to miss significant amounts of work, in both in 1996 and 1997, and in 1998 Wood missed a total of approximately 15 weeks of work due to his cluster headaches. Throughout the above period of time, Defendant Green routinely granted Wood discretionary leave when he had exhausted his medical, sick and vacation time.

In 1999, cluster headaches caused Wood to miss considerable portions of work in January, February, March, July and August. In the Fall of 1999, Wood met with his direct. supervisor, Ed Flannery, for his annual evaluation. During that meeting, Flannery informed Wood he would not receive the customary annual pay increase due to his attendance record. Flannery also indicated to Wood that he may have to submit weekly doctor's notes if Wood missed additional work.

Shortly thereafter, Wood began experiencing another cluster headache. Because he had exhausted all of his sick, vacation and medical leave Wood requested, by letter dated December 6, 1999, that Green grant him a discretionary leave of absence without pay until he could return to work. Wood's letter also indicated that his doctor was sending a letter confirming that he was treating Wood as a patient.

Wood subsequently telephoned Green to check in and inform him that he was still suffering from a cluster headache. Wood testified that Green told him not to worry about his job and to take care of himself. Additionally, Green told Wood to get him a doctor's letter as soon as he could.

Wood's doctor eventually sent the requested letter to Green in late December 1999. Wood remained out of work. On January 5, 2000, Green terminated Wood.

DISCUSSION

Green renews his motion for judgment as a matter of law challenging the jury's finding that he discriminated against Wood in violation of the ADA by terminating his employment. Specifically, Green argues that Wood was not a qualified individual within the meaning of the ADA because the accommodation he requested was not reasonable, and because Wood could not perform the essential functions of his job as Courts Coordinator even with the accommodation. Further, Green argues that Wood failed to adduce any evidence showing that he was subjected to discrimination because of his disability.

Wood argues that a reasonable jury could find that he was qualified within the meaning of the ADA given the unique nature of his job as Courts Coordinator. Wood also asserts that sufficient evidence exists to support the jury's finding that Green discriminated against him because of his disability.

Green's renewed motion for judgment as a matter of law is governed by Fed. R. Civ. P. 50(b) which states in relevant part that "[i]f, for any reason, the court does not grant a motion for a judgment as a matter of law at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment . . . ." Fed. R. Civ. P. 50(b). In considering a Rule 50(b) motion the court may not make credibility determinations or reweigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 151, 120 S. Ct. 2097 (2000). The court must view all of the evidence adduced at trial, drawing all reasonable

inferences in the light most favorable to the nonmoving party, see Montgomery v. Noga, 168 F.3d 1282, 1289 (11th Cir. 1999), and the motion should only be granted "where reasonable jurors could not arrive at a contrary verdict." Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1344-45 (11th Cir. 2000).

1. Whether Wood was a Qualified Individual under the ADA.

The ADA mandates that covered employees shall not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."42 U.S.C. §12112(a). "In order to establish a prima facie case of discrimination under the ADA, the plaintiff must show that: (1) he is disabled; (2) he was a qualified individual at the relevant time, meaning he could perform the essential functions of the job in question with or without reasonable accommodations; and (3) he was discriminated against because of his disability." Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001) (citing Reed v. Heil Co., 206 P.3d 1055, 1061 (11th Cir. 2000)).

A. Leave of Absence as a Reasonable Accommodation.

Green argues that Wood is not a qualified individual within the meaning of the ADA because he requested an indefinite leave of absence as an accommodation. Relying on Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997) (per curiam) , Green maintains that a request for an indefinite leave of absence is an unreasonable accommodation as a matter of law.

In Duckett, the plaintiff worked for the defendant company as a Section Manager and supervised twelve to

thirteen bargaining unit employees. 120 F.3d at 1223. Shortly after achieving his supervisory position, the plaintiff was hospitalized for high blood pressure. See id. at 1224. Subsequently, the defendant placed the plaintiff on its Salary Continuation Program, which provided the plaintiff maximum benefits for a period of up to 24 weeks, and Lesser benefits for a period of up to 28 weeks.

Eventually, the plaintiff's maximum benefits expired and he began receiving the minimum benefits under the plan. The defendant then submitted a long-term disability application with its insurer on the plaintiff's behalf. After receiving a copy of the plaintiff Is disability application, the defendant requested the plaintiff be examined by various doctors. Shortly thereafter, the defendant's personnel manager informed the plaintiff that it had two medical opinions indicating that the plaintiff could return to his job as a Section Manager, and that the position was available. The plaintiff refused, stating that his doctor had not cleared him to return to work. The defendant then terminated his employment.

The plaintiff sued the defendant under the ADA, arguing that he was "otherwise qualified' to work for [d]efendant in a non-supervisory position, and,[d]efendant was required to accommodate him by either transferring him to such a position or allowing him to remain on medical leave under [d]efendant's Salary Continuation Plan." Id. at 1224.

After agreeing with the District Court that transferring the plaintiff would not have been a reasonable accommodation, the Eleventh Circuit also rejected the plaintiff's argument that, as a reasonable accommodation, the defendant was required to allow the plaintiff to exhaust his remaining two months under the Salary Continuation Program. See id. at 1225. Citing Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1994), the Duckett Court held that just because the defendant

created the Salary Continuation Program as a matter of business policy, it was not required to allow the plaintiff to receive benefits under the plan for an entire year as a reasonable accommodation under the ADA. See id. The Court noted that the plaintiff's "need for leave would have been for an indefinite period -- not just a month or two. Put differently, [p]laintiff could not represent that he likely would have been able to work within a month or two . . . and had no way of knowing when his doctor would allow him to return to work in any capacity. Id. at 1226. Quoting from the Myers v. Hose decision, the Court agreed with the Fourth Circuit that an employer did not violate the ADA by "refusing to grant (an employee] a period of time in which to cure his disabilities where the employee sets no temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions. Id. (citation and internal quotation marks omitted). Again directly quoting from Myers, the Duckett Court continued:

> Significantly, these provisions [42 U.S.C. 12111(8); 45 CFR §1232.3(i)] contain no reference to a person's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as to whether an individual "can" (not "will be able to") perform the job with reasonable accommodations. Nothing in the text of the reasonable accommodation provision requires an employer to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.

Id. (citation omitted).

Although Duckett appears persuasive here at first blush, it is ultimately distinguishable given the unique facts of this case. It is undisputed that Wood suffered a cluster headache in late 1999 and was absent from work for the entire month of December. At that time, Wood had already consumed all of his vacation time, sick leave and Family Medical Leave Act benefits. Wood then requested that Green grant him discretionary leave until he could return to his position as Court's Coordinator - a request that was eventually denied and resulted in his termination.

Green's argument -- that Wood asked for an unreasonable accommodation in the form of indefinite leave -- ignores the unique history of the parties and the nature of Wood's disability. Due to the nature of cluster headaches, Wood admittedly could not give a date certain when he would be able to return to work. However, the outer limits of Wood's absences could reasonably be approximated due to Wood's fourteen-year experience with cluster headaches. For instance, a three-month absence from the Clerk's office was the longest absence ever taken by Wood. And Wood undisputedly returned to work immediately after each cluster headache subsided. Wood's request for a reasonable accommodation in December 1999 was not for indefinite discretionary leave. Rather, it was circumscribed by past experience -- and that past experience indicated that Wood would be able to return to work within a month or two. Accordingly, Wood's requested accommodation for discretionary leave is not unreasonable as a matter of law in this unusual circumstance.

B. Evidence that Wood Could Perform the Essential Functions of His Job With a Reasonable Accommodation.

Green also argues that the jury's finding that a reasonable accommodation would have enabled Wood to perform the

essential functions of his job as Court's Coordinator is against the manifest weight of the evidence. Green asserts that Wood's job as Court's Coordinator encompassed a wide variety of duties, and that Wood premised his "accommodation" upon only one of his job description duties -- to receive and analyze legislation. Additionally, Green contends that Wood's self-evaluations over the years, plus his application for Social Security Disability benefits, described his job duties as encompassing much more than just reviewing and analyzing legislation. Accordingly, Green argues that Wood's mere testimony regarding his essential functions cannot stand in light of this contradictory evidence.

Wood disputes this argument, contending that sufficient evidence exists to support his position that reviewing and analyzing legislation was his essential job function as Court's Coordinator. Wood asserts that other duties contained in his job description were simply marginal.

The ADA generally defines essential functions as the "fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position." 29 C.F.R. §1630.2 (n) (1). See, e.g., Lucas v. W.W. Grainger, Inc., 257 F.3d at 1258-59. Whether a particular job duty is an essential function requires a case-by-case evaluation based on a number of factors, including the employer's judgment as to what functions of a job are essential and the written description of the job. See Davis V. Florida Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2001) (citing 42 U.S.C. §12111(8)). other factors include (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the employee to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past

employees an the job, and (5) the current experience of employees in the job. See 205 F.3d at 1305 (citing 29 C.F.R. § 1630.2(n) (3)).

Here, the job description for the Court's Coordinator position clearly list duties other than reviewing and analyzing legislation. Wood, on the other hand, testified that reviewing and analyzing was his essential job function, and that the other described duties were marginal in nature. Wood also testified he spent 50% of his time reviewing and analyzing legislation, and that he could perform the essential functions of his job if he were granted a leave of absence. In light of the above factors, and considering the testimony in the light most favorable to Wood, sufficient evidence support's the jury's finding here that a reasonable accommodation would have enabled Wood to perform the essential functions of his job as Court's Coordinator.

C. Attendance as an Essential Function of the Job.

Citing Davis v. Florida Power & Light Co., Green also argues that Wood's requested accommodation is unreasonable because attendance was an essential function of his job as Court's Coordinator. While Davis supports the proposition that job presence can be an essential function of a job, see 205 F.3d at 1306, that general proposition can be limited in its application dependent on the job in question. Here, reviewing the testimony in the light most favorable to Wood, a reasonable jury could find that the Court's Coordinator position was created for Wood in recognition that his cluster headaches would continue to result in absences. A reasonable jury could also find that Wood's primary responsibility as Court's Coordinator was to review legislation and Florida Supreme Court rules, and to establish court procedures responsive to those changes. Crediting Wood's testimony that it was not essential that he be present at work everyday to keep pace with the above task, coupled

with his performance evaluations over the years, a reasonable jury could also determine that attendance in this unique case was not an essential element of the Court's Coordinator position.

2. Whether Sufficient Evidence of Discrimination Exists.

Green also argues that Wood failed to adduce any evidence showing that he was discriminated against because of his disability. Green asserts that the only evidence Wood presented with respect to discrimination -- i.e, his testimony stating that he believed he was terminated because he suffered from cluster headaches -- is insufficient to prove the requisite discriminatory intent. in fact, Green argues that the evidence actually proves that he went out of its way to treat Wood favorably rather than discriminate against him, and that Wood was simply terminated because of his excessive absenteeism.

Wood contends that a reasonable jury could find that a substantial or motivating factor for his termination was the cluster headaches. Relying on Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), Wood maintains that absences cannot be divorced from a person's disability where the disability in fact causes the absenteeism.

Absent direct evidence of discrimination, "a plaintiff may establish a prima facie case of an ADA violation through circumstantial evidence using the familiar burden-shifting analysis employed in Title VII employment discrimination cases." Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001) (citation omitted). Under this framework, Wood must first make out a prima facie case of disability discrimination, whereupon the burden of production shifts to Green to articulate a legitimate, nondiscriminatory reason for terminating him. See id. at 1242-43. Once Green articulates his reasons, "the presumption of discrimination is eliminated and the plaintiff

has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Id. at 1243 (citations and internal quotation marks omitted); See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-12, 113 S. Ct. 2742 (1993). Wood bears the ultimate burden of persuasion throughout. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1069 (1981).

A plaintiff's prima facie case, coupled with adequate evidence that the defendant's asserted justification is false, may be legally sufficient to sustain the jury's verdict. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 148, 120 S. Ct. 2097. Here, Wood makes out his prima facie case: (1) the parties do not dispute he is disabled, (2) as discussed above he was a qualified individual, and (3) he introduced circumstantial evidence that he was discriminated against because of his disability.

Green then articulated a legitimate nondiscriminatory reason for the termination -- excessive absenteeism. Additionally, Green stated that he fired Wood because, (1) Wood had not gotten a letter from his doctor to Green substantiating his medical condition, (2) Wood failed to pay $400 for his health insurance for December, and (3) Green did not think that Wood really wanted to keep working at the Clerk's Office. Wood introduced evidence,- however, showing that his doctor did in fact submit a letter before his termination, that arrangements had been made to pay the insurance bill, and that he very much wanted to remain employed with the Clerk's Office.

From these facts, a reasonable jury could reasonably believe that Green's articulated reasons for terminating

Wood were pretextual, and that Wood was discriminated against because of his disability.

CONCLUSION

Thus, after careful consideration of the entire record before the Court, the parties, submissions, -and the applicable law, and for the reasons stated herein, the Court hereby:

ORDERS that defendant Charlie Green's motion for judgment as a matter of law is DENIED.

DONE AND ORDERED in Syracuse, New York this 29th day of April, 2002.

/s/ Neal P. McCurn

NEAL P. MCCURN
SENIOR U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12971

D.C. Docket No. 00-00546 CV-FTM-29DNF

MARK WOOD,

Plaintiff-Appellee,

versus

CHARLIE GREEN, Clerk of Circuit Court for Lee County, Florida,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 13, 2003)

Before DUBINA, HILL and COX, Circuit Judges.

DUBINA, Circuit Judge:

This case involves an appeal from the district court's order denying appellant Charlie Green's ("Green's") motion for judgment as a matter of law. For the reasons that follow, we reverse and render.

I. BACKGROUND

A. Facts

Appellee Mark Wood ("Wood") began working for the Clerk's Office of the Circuit Court for Lee County, Florida, in 1974. In 1978, Wood began suffering from cluster headaches. By 1985, Wood's cluster headaches caused him

to miss lengthy periods of work and prevented him from accomplishing a substantial portion of his duties. To accommodate Wood's extended absences resulting from the cluster headaches, the Clerk's Office created the new position of Court Coordinator for Wood. Wood's primary duty in his new position was to review new legislation and rules that affected the courts and to establish procedures accordingly. This duty occupied approximately 50% of his time. The remaining 50% of his time was spent working with the supervisors of the court, acting as a sounding board, monitoring court related financial accounts, representing the office on boards and committees, speaking at conferences, handling difficult customers, and disseminating information to the public. When Wood was absent, other people had to do his work, sometimes including the review and analysis of new legislation. Notwithstanding his health problems, however, Wood received favorable yearly evaluations.

Throughout the years, Green, who was Clerk of the Circuit Court for Lee County, Florida, routinely granted Wood discretionary leave when he had exhausted his medical, sick, and vacation leave. In 1995, Wood missed a total of seven weeks of work. He missed significant amounts of work in both 1996 and 1997 as well. In 1998, Wood missed a total of approximately 15 weeks of work due to his cluster headaches. In 1999, Wood's cluster headaches caused him to miss considerable portions of work in January, February, March, July, and August. In the fall of 1999, Wood met with his direct supervisor, Ed Flannery ("Flannery"), for his annual evaluation. Flannery informed Wood that he would not receive the customary annual pay increase due to his absences from work. Flannery also told Wood that Wood might have to submit weekly doctor's notes if Wood missed additional work.

Shortly thereafter, Wood began experiencing another cluster headache. He requested a discretionary leave of absence without pay until he could return to work. Green approved this leave effective December 2, 1999, with no termination date. Wood subsequently telephoned Green to check in and tell him that he was still suffering from a cluster headache. Green told him not to worry about his job and to take care of himself. Additionally, Green told Wood to provide him with a doctor's letter as soon as he could. Wood's doctor sent a letter to Green in late December 1999. On January 5, 2000, Green terminated Wood's employment. *B. Procedural History* Wood brought an Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et. seq.*, ("ADA") and a Family Medical Leave Act ("FMLA") action against Green. After an eight-day jury trial, the jury returned a verdict in favor of Wood on his ADA discrimination claim and in favor of Green on the FMLA claim. On the ADA claim, the jury awarded Wood back pay. The district court also ordered reinstatement, but stayed such reinstatement pending appeal. Green filed a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court denied Green's Rule 50(b) motion, finding that Wood's requested accommodation for discretionary leave was not unreasonable because it was not for indefinite leave. Rather, Wood's fourteen-year history with cluster headaches, which indicated that he would be able to return to work in a month or two, circumscribed Wood's request. In considering the testimony in the light most favorable to Wood, the district court also found that sufficient evidence existed to support the jury's finding that a reasonable accommodation would have enabled Wood to perform the essential functions of his job.

Green then perfected this appeal.

II. ISSUES

1. Whether Wood's requested accommodation of indefinite leaves of absence is reasonable.

2. Whether sufficient evidence of discrimination on the basis of Wood's disability existed.

3. Whether the jury's verdict is against the manifest weight of the evidence.

4. Whether attendance is an essential function of Wood's job so that his requested accommodation is unreasonable.

III. STANDARD OF REVIEW

"We review a district court's denial of a motion for judgment as a matter of law *de novo*, applying the same standards as the district court." *Afontgomeiy v. Noga,* 168 F.3d 1282, 1289 (11th Cir. 1999). Under Rule 50, a party is entitled to judgment as a matter of law "if during a trial by jury the opposing party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party on that issue." *United States Steel, L.L.C. v. Peco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001) (internal quotations omitted).

IV. ANALYSIS

Indefinite Leave as a Reasonable Accommodation

Green argues that Wood was not a qualified individual within the meaning of the ADA because Wood's requested accommodation of indefinite leaves of absence was not reasonable. We agree.

The ADA provides that employers shall not discriminate against qualified individuals with a disability because of the disability. 42 U.S.C. §12112(a). "In order to establish a prima facie case of discrimination under the ADA, the plaintiff must show that: (1) he is disabled; (2) he was a 'qualified individual' at the relevant time ... ; and (3) he was discriminated against because of his disability." *Lucas v. W. W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 200 1). To

be a "qualified individual" under the ADA, a person must be able to perform the essential function's of his or her job with or without a reasonable accommodation. *Id.* Wood argues that, given the unique nature of his job, a reasonable jury could find that he was a qualified individual within the meaning of the ADA because his request for leaves of absence was a reasonable accommodation.

Green relies on *Duckett v. Dunlop Tire Corp., 120* F.3d 1222 (11th Cir. 1997) (per curiam), in arguing that Wood's request for indefinite leaves of absence is an unreasonable accommodation. In *Duckett, we* held that an employer was not required to allow an employee to stay on medical leave under a salary continuation program. 120 F.3d at 1225. The court noted that:

> the employee's need for leave would have been for an indefinite period - not just a month or two. Put differently, [p]laintiff could not represent that he likely would have been able to work within a month or two ... and had no way of knowing when his doctor would allow him to return to work in any capacity.

Id. at 1226. The court further explained that an employer did not violate the ADA by "refusing to grant [an employee] a period of time in which to cure his disabilities where the employee sets no temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions." *Id.* (citation and internal quotation marks omitted).

> Significantly, these provisions [42 U.S.C. §12111(8); 45 C.F.R. §1232.3(i)] contain no reference to a person's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as to whether an individual "can" (not "will be able to") perform the job with reasonable

> accommodations. Nothing in the text of the reasonable accommodation provision requires an employer to wait for an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.

Id. at 1226 (quoting *Myers v. Hose,* F.3d 278, 283 (4th Cir. 1995)).

In denying Green's Rule 50(b) motion, the district court attempted to distinguish *Duckett.* The district court found that even though, due to the nature of cluster headaches, Wood could not give a date certain when he would be able to return to work, the outer limits of Wood's absences could reasonably be approximated due to his fourteen-year experience with cluster headaches. The district court found that because Wood's longest absence ever was three months and Wood undisputedly returned to work immediately after each cluster headache subsided, his request for a reasonable accommodation was not for indefinite discretionary leave; rather, Wood's past experience circumscribed his request, and that past experience indicated that Wood would be able to return to work within a month or two. Wood urges us on appeal to adopt the district court's reasoning. Wood also argues that *Duckett* actually supports his contention that a leave of absence is a reasonable accommodation because Wood would return to work within a month or two, unlike the plaintiff in *Duckett.*

Wood contends that a leave of absence can be a reasonable accommodation, citing *Garcia-Ayala v. Lederle Partenterals, Inc.,* 212 F.3d 638, 648 (1st Cir. 2000), which explained that:

> [s]ome employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

212 F.3d at 648; *see also Kimbro v. Atlantic Richfield* Co., 889 F.2d 869, 878 (9th Cir. 1989) (holding that leaves of absence for cluster headaches were a reasonable accommodation where no evidence existed as to how the leave of absence would impose an undue hardship on the employer). However, in reaching its conclusion, the First Circuit rejected the findings of the district court, which relied on *Myers v. Hose,* 50 F.3d 278 (4th Cir. 1995). *Myers* held that "reasonable accommodation does not require the County to wait indefinitely for Myers' medical conditions to be corrected, especially in light of the uncertainty of cure." 50 F.3d at 283. We adopted the *Myers* rationale in *Duckett. 120* F.3d at 1225-26. In addition, unlike Wood, the plaintiff in *Garcia-Ayala* had requested leave to a specific date. While a leave of absence might be a reasonable accommodation in some cases, Wood was requesting an indefinite leave of absence. Wood might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. Wood was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future - at some indefinite time. The *Duckett* court parenthetically noted that more compelling facts might lead to a different result. *Id.* at 1226 n.2. For example, the ADA might be violated "if an employee was terminated immediately upon becoming disabled without a chance to use his leave to recover." *Id.*

Wood was not terminated immediately upon becoming disabled. He had been granted years of discretionary leave and had been on a discretionary leave for over one month at the time of his termination. While *Duckett* dealt with indefinite leave, the holding of that case is that an accommodation is unreasonable if it does not allow someone to perform his or her job duties in the present or in the immediate future.

Green created Wood's new position to accommodate Wood's absences from work. In addition, Green previously granted Wood indefinite leaves of absence to deal with his cluster headaches. However, prior accommodations do not make an accommodation reasonable. *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1528 (11th Cir. 1997). Furthermore, Wood's absenteeism had been increasing before his termination. Wood was requesting an accommodation of indefinite leaves of absence so that he could work at some uncertain point in the future. Wood's requested accommodation was not reasonable. *See Duckett, 120* F.3d at 1226. The ADA covers people who can perform the essential functions of their jobs presently or in the immediate future. *Id.* As a result, we conclude from the record that Wood was not a qualified individual under the ADA. Therefore, the district court erred in denying Green's motion for judgment as a matter of law. Because of our disposition of the first issue presented in this appeal, we need not reach the remaining issues.

Based on our foregoing discussion, we reverse the district court's order denying Green's motion for judgment as a matter of law and render judgment in favor of Green.

REVERSED and RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12971-EE

MARK WOOD,

Plaintiff-Appellee,

versus

CHARLIE GREEN, Clerk of
Circuit Court for Lee County,
Florida,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).
Before DUBINA, HILL and COX, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)